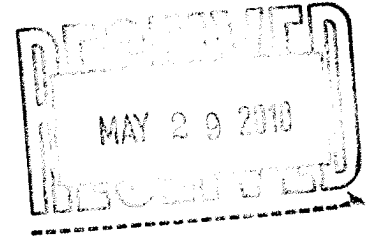


**ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA**



COAL-MAC, INC. ,

Appellant,

v.

Appeal No. 10-19-EQB

**DIRECTORS, DIVISION OF WATER AND
WASTE MANAGEMENT AND DIVISION
OF MINING AND RECLAMATION,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,**

Appellee.

UPON RECONSIDERATION ORDER GRANTING MOTION FOR STAY

Appeal No. 10-19-EQB was filed with the West Virginia Environmental Quality Board ("Board") on April 6, 2010. Contemporaneously with the appeal, Appellant filed a Motion to Stay which was granted by the Board on April 9, 2010.

On April 28, 2010, Appellee filed a Motion to Reconsider to modify the Board's April 9, 2010 Order Granting Appellant's Motion for Stay. The Board granted the Motion to Reconsider and a quorum of the Board heard oral argument on Appellee's Motion to Modify Stay Order at its meeting on Thursday, May 13, 2010.

In brief and at argument, WVDEP directed the Board to consider the impact of its decision and whether it has the authority to offer the Appellant the relief requested.

Appellant appealed to the Board for relief under principles of common law equity and the Board's statutory authority to set the terms and conditions of a Stay. The Board has the authority to grant a Stay "if it appears that an unjust hardship to the appellant will result from the execution or implementation of a chief's or secretary's order, permit or official action pending determination

of the appeal, the appropriate chief, the secretary or the board, as the case may be, may grant a stay or suspension of the order, permit or official action and fix its terms . . .” W.Va. Code § 22B-1-7(d).

Appeal 10-19-EQB is an appeal of the denial of an application for modification of a permit that was issued by WVDEP on December 2, 2008, that imposed selenium limits without a compliance schedule. Other “selenium” appeals set for hearing in July 2010 relate to decisions made by WVDEP on applications for extensions of compliance schedules for final selenium limits in NPDES permits.


The Board finds Appellant’s arguments to be compelling. Appellant demonstrated a potential for financial harm if it is required to comply with the selenium limits it seeks to challenge in its request for a permit modification. The Board agrees that it would not be fair to Appellant if it was required to spend the resources to comply prior to having a hearing on its challenge to WVDEP’s denial of its modification. The Board considered the potential harm to the environment and determined that although selenium is a pollutant of concern there was no discussion at argument or in brief that the levels discharged at this site threaten to cause environmental harm if a Stay were granted.

The Board considered the arguments of counsel and the briefs and finds that its prior decision to grant a Stay in this matter was appropriate. Therefore the Board STAYS the effect of the March 8, 2010 Order and suspends those parts of the Appellant’s permit that impose selenium limits until further order or final order of this Board. This Stay suspends the Permit limits for selenium based on the March 8, 2010 decision and does not retroactively apply to limits in place prior to the denial of the permit modification. The decision of WVDEP to insert selenium limits into the Permit in 2008 is not part of this current appeal insofar as the time period to appeal that decision has passed.

However, the Board does suspend the limits during the pendency of this appeal while it considers the denial of the modification.

This decision of the Board is not to be interpreted as making a decision on the merits of the arguments of the underlying appeal. Nor should this decision be precedent setting for future matters. The Board requests that the parties consider submitting cross motions for summary judgment based on stipulations of fact and the certified record in this case. This matter does not appear to require an evidentiary hearing on these questions as they are primarily questions of law and facts that are not in dispute.

It is so **ORDERED** and **ENTERED** this 26th day of May, 2010.


Dr. Edward Snyder, Chairman

ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

COAL-MAC, INC. ,

Appellant,

v.

Appeal No. 10-19-EQB

DIRECTORS, DIVISION OF WATER AND
WASTE MANAGEMENT AND DIVISION
OF MINING AND RECLAMATION,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Appellees.

CERTIFICATE OF SERVICE

This is to certify that I, Jackie D. Shultz, Clerk for the Environmental Quality Board, have this day, the 26th day of May, 2010, served a true copy of the foregoing **"Upon Reconsideration Order Granting Motion for Stay"** to all parties in Appeal No. 10-19-EQB, by mailing the same via United States Mail, with sufficient postage, to the following address:

via certified first-class mail:

Robert G. McLusky, Esquire
Jackson Kelly, PLLC
P.O. Box 553
Charleston, WV 25322

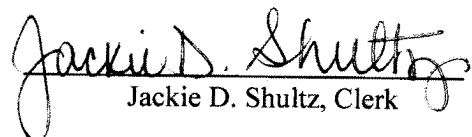
Certified Mail # 91 7108 2133 3937 0494 0745

via personal service:

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Jackie D. Shultz, Clerk